ZULSAFARI AB GHANI & ANOR

v.

SHAHRIL IDRIS

HIGH COURT MALAYA, IPOH
SU GEOK YIAM JC
[CIVIL APPEAL NO: 12-40-2001]
6 FEBRUARY 2002

ROAD TRAFFIC: *Negligence - Road accident - Whether trial judge erred in apportioning equal liability between plaintiff and 2nd defendant - Whether trial judge failed to consider all relevant evidence - Whether extremely high standard of care placed on 2nd defendant - Whether trial judge failed to draw proper inferences from proven facts*

EVIDENCE: *Adverse inference - Whether judge failed to consider relevant evidence - Whether judge erred in drawing adverse inference against 2nd defendant - Evidence Act 1950, s. 114(g)*

The plaintiff, driving a motorcycle, collided into a stationary motor car belonging to the 1st defendant and driven by the 2nd defendant, and fell down, after which a motor van, owned by the 3rd defendant and driven by the 4th defendant, collided into the plaintiff from the rear. The plaintiff contended that the 2nd defendant was wholly or contributorily negligent in creating a dangerous situation *viz* by causing the motor car to obstruct the plaintiff's right of way on the slow lane of the highway as the 2nd defendant had parked the motor car in such a way that half of the motor car was on the slow lane and the other half was on the emergency lane without placing any warning sign behind the motor car or switching on the hazard lights. The learned trial judge found the 2nd defendant and plaintiff equally liable for the accident. Hence, this appeal by the 1st and 2nd defendants.

Held:

[1] The failure of the learned trial judge to give reasons as to why he chose to disregard important evidence caused his decision to be seriously flawed. If he had considered these matters, he would have found that the evidence in actual fact corroborates and supports the 2nd defendant's version of the accident. (pp 204 h & 205 a)

[2] The learned trial judge erred when he failed to consider that had the plaintiff kept at a safe distance from the motor lorry and also kept a proper lookout, he could have avoided colliding into the motor car since there was ample evidence to the effect that both the lights and the hazard lights of the motor car were switched on and could be seen 30 metres away. Had the learned judge considered this factor, he would have held in favour of the 2nd defendant. (p 207 d-e)

[3] An extremely high standard of care was not placed on the 2nd defendant as the learned trial judge did not accept the 2nd defendant's version that he had parked the motor car wholly within the emergency lane. (p 207 f)

[4] The learned trial judge erred when he drew an adverse inference under s. 114(g) of the Evidence Act 1950 against the 2nd defendant for failing to call the tow truck operators as he did not consider the evidence of the adjustor on this issue. If he had, he would have been satisfied that sufficient attempts were made to locate the tow truck operators. (p 208 f)

[5] The learned trial judge had erred when he failed to draw the proper inferences from the proven facts. Otherwise, he would have held that the 2nd defendant was 25% liable to the plaintiff for the injuries, disabilities, pain and loss suffered by the plaintiff as a result of the accident. (p 212 a, e & f)

[Appeal on liability allowed; appeal on quantum of damages dismissed.]

Case(s) referred to:

Abdul Mokhti Hj Ahmad v. Idris Ibrahim [1977] 2 MLJ 85 ***(dist)***

Ahmad Nordin Hj Maslan & Anor v. Eng Ngak Hua & Ors [1985] 2 MLJ 431 ***(refd)***

Chan Loo Khee v. Lai Siew San & Ors [1971] 1 MLJ 253 ***(refd)***

China Airlines Ltd v. Maltran Air Corp Sdn Bhd & Another Appeal [1996] 3 CLJ 163 ***(refd)***

Chop Seng Heng v. Thevannasan & Ors [1975] 2 MLJ 3 ***(refd)***

De Cotta v. Tan Hock Lee [1972] 2 MLJ 173 ***(refd)***

London Passenger Transport Board v. Upson [1949] AC 155 ***(refd)***

Mohd Salleh Samad v. Zainodin Dongking [2002] 1 CLJ 139 ***(refd)***

Parkinson v. Liverpool Corpn. [1950] 1 All ER 367 ***(refd)***

Samar Mansor v. Mustafa Kamarul Ariffin [1974] 2 MLJ 71 ***(foll)***

Siow Choo Foo v. Lee Peng Lay & Anor [1981] 2 MLJ 336 ***(dist)***

Zainap Abd Majid & Ors v. Gan Eng Hwa & Ors [1995] 1 MLJ 801 ***(dist)***

Legislation referred to:
Evidence Act 1950, s. 114(g)

For the appellant - Gurmit Singh; M/s Gurmit & Co
For the respondent - Sarjeet Singh Sandhu; M/s Sandu & Assoc

Reported by Suresh Nathan

JUDGMENT

Su Geok Yiam JC:
This is an appeal against the decision of the learned Sessions Court Judge, Teluk Intan in a running down case.

The Undisputed Facts
The undisputed facts are briefly as follows:

On 19 October 1998, a collision occurred between a motorcycle, bearing registration no. ACD 7929, ridden by the plaintiff and a motor car, bearing registration no. MAJ 4798, belonging to the 1st defendant and driven by the 2nd defendant (hereinafter referred to as "the first collision"). At the time of the first collision, the motor car was left stationary by the second defendant along the left side of the North South highway at the 323.3 km in the district of Tapah as one faces southwards.

After colliding into the motor car the plaintiff fell on to the highway. Soon after this a motor van, bearing registration no. BEW 9884, owned by the 3rd defendant and driven by the 4th defendant, came along and collided into the plaintiff from the rear (hereinafter referred to as "the second collision").

All three vehicles were travelling in the same direction ie, towards Kuala Lumpur. The plaintiff, the 2nd defendant and the 4th defendant lodged police reports, *viz* Tapah Report Nos. 924/99, 1764/98 and 1763/98, respectively.

The accident caused the three vehicles to be damaged as follows to use the words of the investigating officer:

(a) **The motorcycle**

i. Lampu besar depan pecah.
ii. Penghadang angin depan kiri pecah.
iii. Handle bengkok.
iv. No. plet depan patah.
v. Lampu isyarat kiri kanan depan pecah.

(b) **The motor car**

i. Lampu belakang besar kanan pecah.
ii. Dinding di bahagian bucu sebelah kanan kemek.
iii. Lampu isyarat belakang kanan pecah.

(c) **The motor van**

i. No. plet depan retak.
ii. Kesan-kesan kaca di bahagian depan.

As a result of the two collisions (hereinafter referred to as "the said accident") the plaintiff suffered the following injuries:

(a) compound Grade III A fracture of the left femur;

(b) 4cm lacerated wound over the left thigh;

(c) close fractures of the left tibia and fibula;

(d) compound fracture dislocation of the right ankle;

(e) compound fracture dislocation of the right ring finger at the distal inter-phalangeal joint;

(f) compression fracture of lumbar 1 and lumbar 2 vertebrae with complete paraplegia; and

(g) right lung contusion and haemathorax.

He also suffered from the following disabilities:

(a) he has complete paraplegia below the lumbar 1 and lumbar 2 levels with total loss of bladder and bowel control and no sensation or motor power in the lower limbs. This is permanent;

(b) the lower limbs are wasted and have uncontrolled spastic contractions and contractures of the knee and ankles. The right ankle is deformed and has a fixed flexion deformity. This is permanent;

(c) he cannot straighten his back to sit comfortably on the wheel chair or chair because of the kyphotic deformity of the thoraco lumber spine. This is permanent; and

(d) the right ring finger is deformed and medially deviated. He has difficulty in forming a full fist with the right hand. This is permanent. However, there is a possibility of recovery of his right hand. Although he cannot use his right hand with full force he can perform light duty in future as an operator.

As a result of his injuries and disabilities the plaintiff:

(a) ambulates in a wheel chair and needs help to get in and out of the wheel chair and the bed;

(b) needs to change the catheter every three weeks;

(c) needs an assistant to help him with his toilet needs, to bathe him and to transport him in and out of the wheel chair or bed;

(d) needs pampers to collect his stool;

(e) needs surgery to remove the nail in his left femur and plate in his left tibia. This will cost RM4,000; and

(f) needs regular medical reviews as he is prone to suffer from urinary tract infections and bedsores.

The plaintiff sued the four defendants in the Sessions Court, Teluk Intan seeking damages for his injuries, disabilities, pain and suffering and loss. He alleged, *inter alia*, that the accident was caused solely or contributed to substantially by the negligence of the 2nd and 4th defendants.

The Plaintiff's Amended Statement Of Claim

In para. 6 of his amended statement of claim, the plaintiff has pleaded specifically as follows:

> Apabila plaintiff sampai berdekatan di KM 323.3 Lebuh Raya Utara/Selatan (di kawasan Tapah), Plaintiff telah berlanggar dengan sebuah motokar No. MAJ 4798 yang terletak dan terbiar dengan posisi separuh badan kereta di atas lorong kecemasan dan separuh lagi di lorong perlahan Lebuh Raya tersebut dan tanpa sebarang tanda isyarat amaran oleh Defendan Kedua pada ketika itu.

The plaintiff has also set out the following particulars of the negligence of the 2nd defendant:

(a) …

(b) Menghalangi laluan sah Plaintif secara salah;

(c) Gagal untuk menjaga keselamatan penguna-penguna jalanraya yang lain terutama terhadap Plaintif pada masa ketika itu;

(d) Gagal untuk memberi sebarang lampu isyarat ataupun tanda isyarat amaran yang mencukupi dan jelas di bahagian belakang motorcar MAJ 4798;

(e) Meletak dan membiarkan motokar No: MAJ 4798 dengan separuh badan kereta di atas garisan sempadan lorong kecemasan dan separuh lagi di atas lorong perlahan lebuhraya tersebut tanpa memastikan bahawa ia adalah selamat pada masa ketika itu;

(f) …

(g) Gagal untuk mengambil langkah-langkah waspada, berjaga-jaga dan pengawalan yang patut dan munasabah sebagai pengguna jalanraya untuk mengelak perlanggaran ini akibat dari suasana merbahaya dan cemas yang ditimbulkan pada masa ketika itu;

(h) Gagal mematuhi kod dan Akta Jalanraya.

It is apparent from the above that the plaintiff's case is that the 2nd defendant is wholly or contributorily negligent by creating a dangerous situation, *viz* by causing the motor car to obstruct the plaintiff's right of way on the slow lane of the highway because the 2nd defendant had parked the motor car in such a way that half of the motor car was on the slow lane and the other half was on the emergency lane without placing any warning sign behind the motor car or switching on the hazard lights.

In respect of the 4th defendant, the plaintiff has pleaded the following particulars of the negligence of the 4th defendant in his amended statement of claim:

(a) Memandu motovan No. BEW 9884 di dalam keadaan terlaju;

(b) Gagal untuk memberi perhatian yang cukup dan jelas kepada Plaintif pada masa ketika itu;

(c) Melanggar Plaintif dari belakang secara salah;

(d) Gagal untuk menjaga keselamatan penguna-penguna jalanraya yang lain terutama terhadap Plaintif pada masa ketika itu;

(e) Gagal untuk mengendalikan motovan No: BEW 9884 dengan kebijaksanaan di dalam apa jua keadaan;

(f) Gagal untuk berhenti, memperlahankan, mengelak ataupun mengawal dan mengendalikan motovan No: BEW 9884 dengan cara-cara yang lain untuk mengelakkan perlanggaran ini;

(g) Gagal mematuhi kod dan Akta Jalanraya.

However, Mr. Sarjeet Singh, the learned plaintiff's counsel, informed this court that since the plaintiff's statement of claim was not served on the 4th defendant the plaintiff had withdrawn its claim against the 4th defendant and the plaintiff's claim against the 4th defendant was subsequently struck out. In the light of that, I have not dealt with the plaintiff's case against the 4th defendant nor the defence of the 4th defendant nor the liability or otherwise of the 4th defendant in this appeal. For the purposes of this appeal the 4th defendant's role is that of a witness, that is, SD2.

The 1st And 2nd Defendants' Statement Of Defence

The 1st and 2nd defendants have pleaded as follows in para. 6 of their statement of defence filed on 16 November 1999 at p. 20 of the appeal record:

> 6. Defendan Pertama dan Kedua menyatakan perlanggaran itu telah diakibatkan secara keseluruhannya dan/atau disumbangkan oleh kecuaian penunggang motosikal No. ACD 7929 apabila melanggar motokar Defendan Kedua yang rosak dari belakang kanan dan yang diletak dalam lorong kecemasan dengan lampu serta isyarat kecemasan dipasang.

They have also set out the following particulars of the plaintiff's negligence:

> a. Gagal memberi sebarang perhatian yang secukupnya kepada kehadiran motokar Defendan Kedua yang diletak dalam lorong kecemasan dengan lampu dan isyarat kecemasan dipasang;
>
> b. Gagal berhati-hati dan/atau mengurangkan lajunya apabila melihat kehadiran motokar Defendan Kedua yang rosak dalam lorong kecemasan dengan lampu dan isyarat kecemasan dipasang;
>
> c. …
>
> d. …
>
> e. Gagal mengambil apa-apa pertimbangan yang memadai untuk keselamatan diri sendiri semasa menunggang motosikalnya di jalan tersebut;
>
> f. Menunggang motosikalnya dengan laju sehingga tidak dapat mengawal motosikalnya dengan baik;
>
> g. …
>
> h. Gagal melihat dan/atau mengawasi motokar Defendan Kedua dalam masa yang mencukupi memandangkan jalan tersebut adalah lurus serta lampu dan isyarat kecemasan dipasang untuk mengelak perlanggaran tersebut;
>
> i. Gagal memberhenti, memperlahankan dan/atau mengawal dengan baik dalam apa cara lain untuk mengendalikan atau mengawal motosikalnya untuk mengelak perlanggaran tersebut;
>
> j. Menunggang motosikal dengan sikap cuai dan bahaya sehingga perlanggaran berlaku dengan motokar Defendan Kedua;
>
> k. …
>
> l. …
>
> m. …

n. …

o. Menunggang motosikal di sebelah jalan yang salah dan/atau di lorong kecemasan dan melanggar motokar Defendan Kedua;

p. …

q. …

r. Mengikut kenderaan lain dengan jarak yang dekat dan tidak selamat dan melanggar motokar Defendan Kedua;

s. Gagal memasang lampu atau memasang lampu yang tidak terang dan tidak mencukupi untuk melihat motokar Defendan Kedua;

From the relevant portions of the statement of defence of the 1st and 2nd defendants as set out above it is apparent that the defendant's case is that the plaintiff had collided into the rear right corner of the motor car while it was parked on the emergency lane with both its lights and hazard lights switched on and in so doing the plaintiff was wholly negligent or contributorily negligent because the plaintiff did not keep a proper look-out, was speeding, was riding on the wrong part of the road and/or the emergency lane, was following too closely behind another vehicle and either did not switch on his lights or had switched on his lights but his lights were not bright enough to enable the plaintiff to see the motor car.

The Decision Of The Learned Trial Judge

The trial in the court below went on for several days. Upon the conclusion of the trial, the learned Sessions Court Judge, Teluk Intan, on 23 February 2001, found both the 2nd defendant and the plaintiff equally liable for the accident and apportioned liability between them at 50% / 50%.

Based on 100% liability he awarded to the plaintiff the following:

(1) a sum of RM190,800 as general damages for injuries suffered by the plaintiff with interest at 8% per annum from the date of service of the summons to the date of judgment;

(2) a sum of RM38,400 as special damages for loss of earnings with interest at 4% per annum from the date of accident to the date of judgment;

(3) a sum of RM20 being special damages for the cost of police documents with interest at 4% per annum from the date of accident to the date of judgment;

(4) a sum of RM120 being special damages for the cost of medical reports with interest at 4% per annum from the date of accident to the date of judgment;

(5) a sum of RM1,400 being special damages for the cost of purchasing a wheel chair with interest at 4% per annum from the date of accident to the date of judgment;

(6) a sum of RM2,000 being special damages for the cost of removing the metal plate and screw from the plaintiff's leg with interest at 4% per annum from the date of accident to the date of judgment;

(7) a sum of RM660 being special damages for the cost of the specialist orthopaedic report with interest at 4% per annum from the date of accident to the date of judgment;

(8) a sum of RM20,160 being special damages for the cost of purchasing pampers with interest at the rate of 4% per annum from the date of accident to the date of judgment;

(9) a sum of RM325 being special damages for traveling expenses with interest at 4% per annum from the date of accident to the date of judgment;

(10) a sum of RM14,000 being special damages for the pretrial cost of nursing care; and

(11) a sum of RM80,931 being special damages for the post trial cost of nursing care.

All the above awards except items (10) and (11) carried interest at 8% per annum from the date of judgment to the date of settlement.

The learned trial judge also awarded costs of the action to the plaintiff.

The 1st And 2nd Defendants' Appeal

On 7 March 2001, the 1st and 2nd defendants, being dissatisfied with the decision of the learned trial judge both on liability and quantum filed their notice of appeal.

In their memorandum of appeal filed on 25 May 2001, the 1st and 2nd defendants, who are the appellants in this appeal, have set out 17 grounds in support of their appeal.

However, when their appeal came up for hearing before this court on 4 December 2001, Mr. Gurmit Singh, the learned counsel for the appellants, informed the court that they were proceeding only on the following five issues:

(1) whether there was a failure on the part of the learned trial judge to consider all the evidence adduced during the trial (paras. 1 and 4 of the memorandum of appeal);

(2) whether there was a failure on the part of the learned trial judge to consider the ability of the plaintiff who is the respondent in this appeal to avoid colliding into the 1st defendant's motor car had he followed the motor lorry at a safe distance; (para. 9 of the memorandum of appeal);

(3) whether the learned trial judge had erred when he placed on the 2nd defendant an extremely high standard of care (paras. 10, 11, 15 and 16 of the memorandum of appeal);

(4) whether the learned trial judge had erred when he drew an adverse inference under s. 114(g) of the Evidence Act 1950 against the defendants for failing to call the tow truck operators to testify on the defendants' behalf (para. 14 of the memorandum of appeal); and

(5) whether the learned trial judge had erred when he held that the plaintiff and the 2nd defendant were equally liable for the accident (para. 2 of the memorandum of appeal).

The court shall now consider each of the five issues in the light of the oral submissions of both the learned counsels, the appeal record, the grounds of judgment of the learned trial judge, the principles of law applicable and the decided cases relied upon by the learned counsels.

Issue 1: Whether There Was A Failure To Consider All The Evidence Adduced

Having subjected the learned trial judge's grounds of judgment and the notes of evidence to a close scrutiny this court found as follows:

(1) the learned trial judge had accepted in toto the plaintiff's version as to how the accident occurred without assigning any reason thereunto. According to the plaintiff just before the first collision he was riding behind a small motor lorry along the North-South Highway going towards the direction of Kuala Lumpur. At the 323.3 kilometer the motor lorry suddenly turned right into the fast lane. When this happened he was shocked by the sight before him of a motor car which was parked with half of it on the emergency lane and the other half on the slow lane without any warning sign. He attempted to avoid colliding into the motor car but was unable to do so because the distance between him and the motor car was too short;

(2) unfortunately, other than setting out the damage to the plaintiff's motorcycle and the 1st defendant's motor car and noting that the scene of the accident was a straight stretch of road as shown in the sketch plan, P1, and there were glass splinters at 'C' in the sketch plan, P1, and photograph, P2E, i.e. at the sides of the slow lane and the emergency lane and a spot of oil at 'B' in P1 and in P2E, and stating that after scrutinising the evidence he found on the balance of probabilities, the plaintiff's version more probable, the learned trial judge did not explain why he was of that view;

(3) neither did the trial judge, having accepted the plaintiff's version as being more probable proceed to hold the 2nd defendant wholly liable for the accident;

(4) instead, he apportioned liability equally between the plaintiff and the second defendant at 50%/50% on the following grounds:

(a) that the accident had occurred at night at about 8 to 8.30pm;

(b) that the scene of the accident was dark at the material time;

(c) that the 2nd defendant did not park the motor car wholly within the emergency lane based on the presence of glass splinters on the left side of the slow lane and on the right side of the emergency lane as one faces southwards;

(d) the 2nd defendant did not place any sign to warn other vehicles that he had parked the motor car there; and

(e) he drew an adverse inference against the 2nd defendant for not calling the tow truck operators, whom the 2nd defendant had alleged had stopped in front of the motor car, to testify as to the truth of the 2nd defendant's assertion that he had parked his car wholly within the emergency lane.

Before me, Mr. Gurmit Singh, the learned counsel for the 2nd defendant, submitted that the learned trial judge had failed to take into account the presence of tyre marks in the emergency lane. He was of the view that had the learned trial judge considered this factor in addition to the presence in the emergency lane near to the grass verge of the spot of oil at 'B' in the sketch plan, P1, he would have arrived at a different conclusion because these two factors together supported the 2nd defendant's version that he had left the motor car parked wholly within the emergency lane and not with half of the motor car on the emergency lane and the other half on the slow lane as alleged by the plaintiff.

Mr. Gurmit Singh further submitted that the plaintiff had on p. 56 of the Appeal Record admitted that he had followed too closely behind the motor lorry and that if he had kept at a safe distance he could have avoided colliding into the motor car. However, there is nothing in the grounds of judgment of the learned trial judge to show that he had considered this piece of evidence when he ruled that the plaintiff's version was more probable.

In response, Mr. Sarjeet Singh, the learned counsel for the 2nd defendant, conceded that although the investigating officer had given evidence that the tyre marks found in the emergency lane were believed to be those of the motor car he had not taken any measurements to confirm this.

In his submissions in reply, Mr. Gurmit Singh added that at p. 51 of the Appeal Record there was evidence from the investigating officer that he had found oil stains on the tyre of the motor car.

The Plaintiff's Evidence

The court shall now deal with the evidence of the plaintiff.

The plaintiff had testified, *inter alia*, as follows:

On 19 October 1998, he was involved in a road accident at the 323.3 kilometre along the North-South Highway. He was riding alone on his motorcycle, heading south, towards Kuala Lumpur from Kuala Kangsar. He was traveling at a speed of 80 kph. He was following right behind a small empty motor lorry along the slow lane at a distance of 9 feet. At that point of time it was not raining but it was dark and cold. Some parts of the road were wet and there were also puddles of water on the road. Suddenly, the motor lorry turned right into the fast lane. When this happened he was shocked because he saw before him a motor car which was parked half on the emergency lane and the other half on the slow lane without any warning signs. He attempted to avoid colliding into the motor car by swerving to his right. Unfortunately, he was unable to do so because the distance between his motorcycle and the motor car was only 16 feet and the motor car which had no lights was in his right of way. The left handle bar of his motorcycle collided into the rear right lamp of the motor car and the plaintiff fell onto the road in the slow lane. Soon after this another vehicle collided into him from behind. He felt pain in his back and thereafter he lost consciousness. When he recovered consciousness he found himself in an ambulance which was taking him to the Tapah district hospital.

In his police report, P3, he had given the time of the accident as about 8pm.

In cross-examination he agreed as follows:

He was following too closely behind the motor lorry. It is against the law to ride a motorcycle in the emergency lane irrespective of whether it is daytime or night time. It is also against the law to ride a motorcycle on the white line separating the emergency lane and the slow lane. He did not see the motor van following him from behind because he did not look into the rear mirror of his motorcycle although his motorcycle had a rear mirror.

However, he disagreed as follows:

He did not switch on his front and rear lights. He had been advised to lodge P3 in the way it was drafted.

This court notes that the manner in which the first and second collisions had taken place as was stated by the plaintiff in his oral evidence in the court below is similar and consistent with that contained in his police report, P3, at p. 105 of the Appeal Record.

The Investigating Officer's Evidence

The court shall now next deal with the evidence of the only independent witness, namely, the investigating officer (I.O.), who testified for the plaintiff.

The I.O., Sergeant 68739 Ameruddin bin Hamzah, SP1, had testified, *inter alia*, as follows:

The accident occurred at about 7.30pm. He received the first information report at 8.20pm. He arrived at the scene of the accident at 8.51pm. He found spillage of oil in the emergency lane at the spot marked 'B' in his sketch plan, P1. He believed it came from the motor car. He agreed at p. 50 of the Appeal Record that there were tyre marks in the emergency lane as shown in the photograph, ID2E. He believed the tyre marks came from the motor car because upon his examination of the tyre of the motor car he found traces of oil on the tyre. He agreed that he did not record the presence of the tyre marks in the emergency lane in his sketch plan, P1.

The 2nd Defendant's Evidence

The court shall now deal with the evidence of the 2nd defendant.

The 2nd defendant had testified as follows:

On 19 October 1998 at about 5pm, he was driving the motor car together with his wife from Taiping towards Kuala Lumpur. At about 6 or 6.30pm, on reaching the 323.3 kilometre along the North-South Highway which was a straight stretch of road, smoke came out from behind the motor car. He stopped the motor car in the emergency lane as he was of the opinion that in the circumstances that was the safest place for him to do so. He switched on both the lights and the hazard lights. He then inspected the engine and found that it was not functioning. Before he could call for assistance from PLUS a private tow truck operator suddenly appeared in front of the motor car and offered to tow the motor car to a workshop. He asked the tow truck operator to place cones behind the motor car but was told that it was not necessary as the tow truck operator wanted to tow the motor car rightaway to the workshop. Upon the tow truck operator's assurance the 2nd defendant and his wife got into the car of the tow truck operator's friend which was parked across the highway in the direction of Ipoh. As he left the place where the motor car was parked he could still see the hazard lights flashing. At that time it was not raining and the road was dry. Although it was twilight time it had not turned dark yet.

However, the car in which he was in had to make a U-turn at Gopeng in order to get to the workshop. As he reached the place where he had left his motor car he saw that there was a traffic jam and the rear right lamp of his car including the signal light was broken. The PLUS patrol personnel were controlling the traffic flow along the highway. He asked the tow truck operator what happened and was told that a motorcycle had collided into the rear right of his motor car and that the motorcyclist who had fallen down onto the road was subsequently collided into by a motor van.

On the orders of the PLUS patrol personnel, he had the motor car towed to the Tapah police station by the tow truck operator. While his motor car was being towed away the traffic police arrived at the scene of the accident. He then went to the Tapah police station and lodged his report, D10.

In cross-examination he had agreed as follows:

In his police report he had said that the motor car had broken down at 7.30pm. He had spent 15 minutes inspecting the motor car and thinking about the next course of action to take. After that he spent another half an hour talking to the tow truck operator and the latter's friend. The accident occurred at about 8.15 to 8.30pm. It was already dark at the scene of the accident. No warning sign was placed behind the motor car. He

could have moved the motor car onto the grass verge in the emergency lane with the help of the three tow truck operators. He could have prevented the accident from happening if that had been done. If a cone had been placed behind the motor car the plaintiff could have seen the cone and avoided the first collision.

He, however, maintained that he had switched on his hazard lights and that the motor car was not obstructing the traffic. He disagreed that the accident arose as a result of his negligence in not placing a cone behind the motor car and in not parking the motor car on the grass verge in the emergency lane.

In re-examination, the 2nd defendant had clarified as follows:

He did not park his car on the grass verge because he had exercised his right to park his car in the emergency lane when his car developed engine trouble. He had inspected the engine and saw oil dripping onto the road surface. With regard to his failure to place a cone behind his car he explained that if the plaintiff could not see the lights of the car there is a possibility that the plaintiff would have collided into the cone even if he had placed a cone behind his car. Notwithstanding that as he did not carry a cone in the motor car he was unable to place a cone behind the motor car. He was also not sure whether the tow truck operator had a cone.

In support of his case, the 2nd defendant called three witnesses, namely, his wife, Puan Noor Hafizah bt. Zakaria, SD3, the driver of the motor van, Encik Zaidi bin Alias, SD2, and an adjuster, Encik Francis a/l Stephen, SD4.

The Motor Van Driver's Evidence

The court shall now deal with the evidence of SD2, the driver of the motor van first.

SD2 who works as a surveyor's assistant had testified as follows:

On 19 October 1998 at about 6.30p.m., he was driving his motor van in the slow lane from Sungai Siput North in the direction of Kuala Lumpur. With him in the motor van were his wife and his paternal uncle. Upon reaching the 323.3 kilometre which was a straight stretch of road at about 7 or 7.30pm he saw ahead of him at a distance of 30 metres, a vehicle in the emergency lane with its hazard lights switched on as the lights were flashing. He was positive that the vehicle, namely, a motor car, was wholly within the emergency lane. Suddenly, when his motor van was 5 or 6 metres away from the motor car a motorcycle collided into the rear right of the motor car. As a result thereof, the motorcycle fell onto the road. The motorcyclist who was thrown off his motorcycle fell onto the road right into his path.

His attempt to avoid colliding into the motorcyclist by swerving to the right proved unsuccessful. After colliding into the motorcyclist he went straight to the police station and lodged a police report, D11.

Prior to the first collision he did not see the motorcycle. This caused him to believe that the motorcycle was being ridden on the left side of the slow lane and not in front of him.

In cross-examination he disagreed as follows:

The first collision occurred at about 8 or 8.30pm at night. It was dark at that time and that he could not see the motorcycle prior to the collision because he did not switch on the lights of the motor van or because he was not keeping a proper lookout. Half of the motor car was on the slow lane and the other half was on the emergency lane. He was travelling at a speed exceeding 90 kmph and that he was unable to avoid colliding into the motorcyclist because he was following the motorcyclist too closely.

In re-examination, he explained that he did not look at the left side of the road because his attention was focused in front of him. He did not know where the motorcycle was shortly before the first collision. He did not switch on the lights of his motor van because there was still sufficient daylight to enable him to see in front of him.

The 2nd Defendant's Wife's Evidence

I shall now deal with the evidence of SD3.

As expected, the testimony of SD3, the 2nd defendant's wife, supported the evidence of the 2nd defendant and also SD2 in material particulars. According to her, on 19 October 1998, she and her husband, the second defendant, had left Taiping for Kuala Lumpur in the motor car. When they were approaching Tapah at about 7.30pm the motor car broke down because of engine problems and the 2nd defendant stopped his car in the emergency lane so as not to obstruct the other road users. They did not intend to leave the motor car there for the night.

The 2nd defendant then switched on the hazard lights and the headlights. Half an hour later a tow truck passed them, stopped and offered assistance subject to payment. A friend of the tow truck came in another car from the opposite direction and took her and the second defendant to the workshop to await their motor car. However, before they could get to the workshop, they had to make a U-turn. Upon doing so and upon reaching the spot where they had left the motor car earlier she found that there was a traffic jam and that the south bound traffic was moving slowly. She learnt that this came about because a motorcycle had collided into the motor car.

In cross-examination she said that the first collision occurred at about 8 or 8.30pm at night. It was dark at the scene of the accident. There was a grass verge in the emergency lane. She disagreed that part of the motor car was on the emergency lane and the other part was on the slow lane. She also disagreed that the hazard lights were not switched on and that they were not flashing.

Evidence Not Considered By The Learned Trial Judge

The court observes that the learned trial judge had not considered that amongst the plaintiff, the 2nd defendant and SD2, it was SD2 who lodged his report, D11, first in point of time, ie, on 19 October 1998 at 8.13pm. In his report he expressly mentioned that the motor car was in the emergency lane. The second report to be lodged, D10, was also on the same day, ie, 19 October 1998 but half an hour later, ie, at 8.41pm by the 2nd defendant. In his report he expressly mentioned that his car had problems and he had parked it in the emergency lane with both the signal lights and the rear lights on. The plaintiff only lodged his report, P3, a good seven months after the accident, ie, on 20 May 1999 at 11.35am. In his report he mentioned that half of the motor car was on the emergency lane and the other half on the slow lane. He also mentioned that he was following a motor lorry which suddenly turned right into the fast lane. As he was following too closely behind the motor lorry he was unable to avoid colliding into the motor car.

The learned trial judge did not consider that since the 2nd defendant and SD2 had lodged their reports at the earliest available opportunity the contents of their report were more likely to be true as opposed to the plaintiff who lodged his report very much later thereby giving rise to the possibility that the contents of his report may not be true and that his report may have been drafted in a manner so as to protect his own interest and conceal what actually occurred since he had ample opportunity to do so. The learned trial judge also did not consider that the plaintiff did not give the registration number of the motor lorry in his police report although in his oral testimony in court he has mentioned that he was following closely behind the middle of the motor lorry and the lights of his motorcycle were switched on.

The learned trial judge also erred when he did not view the plaintiff's evidence in the light of the other evidence. Had he done so, he would have found that if what the plaintiff told the trial judge was indeed true about riding his motorcycle closely in the middle behind a small motor lorry he would not and could not have collided into the motor car because his reflex action would have caused him to automatically swerve to the right as was

done by the motor lorry. If the motor lorry whose body is manifestly very much broader than the motorcycle could have swerved to the right to avoid the first collision assuming for a moment what the plaintiff said about the existence of the motor lorry was true it is inherently improbable why the plaintiff could not have similarly done so.

The learned trial judge also did not consider whether the glass splinters in the slow lane at 'C' in the sketch plan, P1, could have come about from the first collision or the second collision. It would appear from his extremely brief grounds of judgment that he had gone on the assumption that all the glass splinters found by the I. O. at 'C', both in the emergency lane and in the slow lane in the sketch plan, P1, had come from the first collision. He failed to consider the unchallenged evidence of the plaintiff's own witness, SP1, the I. O. that quite apart from the damage to the rear right lamp of the motor car, the headlights of the motorcycle and both the left and right signal lights of the motorcycle were also broken. He also failed to consider whether the glass splinters at 'C' in the sketch plan, P1, which the I. O. had found on the left side of the slow lane could have been caused by the second collision. His omission to do so amounts to a misdirection in law because of the unchallenged and undisputed evidence of the plaintiff himself and SD2 that soon after the first collision, the plaintiff fell onto the highway and the 2nd collision followed.

Neither did the learned trial judge explain in his grounds of judgment why he had chosen to disregard completely the oral evidence of the I. O., SP1, the driver of the motor van, SD2, and the 2nd defendant's wife, SD3, which corroborated substantially the oral evidence of the 2nd defendant on four very material matters. The first is that SD2 and SD3 had testified that the lights and hazard lights of the motor car were switched on and were flashing. SD2 had testified that he could see the hazard lights flashing at a distance of 30 metres. The second is that the I. O. had testified that there were tyre marks in the emergency lane and traces of oil on the tyre of the motor car. The third is the width of the emergency lane excluding the portion which is covered by grass had been measured by the I.O., SP1, who is the plaintiff's own witness, and more importantly, an independent witness, is clearly stated in the sketch plan, P1, to be 2.6 metres or about 8 feet wide which is certainly wide enough to contain the whole width of the motor car without the necessity for the motor car to encroach into the slow lane. The fourth is the testimony of SD2 and SD3 that the motor car was wholly within the emergency lane. In my view the failure of the learned trial judge to give reasons as to why he had chosen to disregard the above has caused his decision to be seriously flawed. If he had

considered these four very important matters he would have found that the presence of the glass splinters in the emergency lane at 'C' in the sketch plan, P1, in actual fact corroborates and supports the version of the 2nd defendant. He would, consequently, have ruled that it was more probable that the motor car was parked wholly within the emergency lane. He would also have concluded that if it was indeed true as alleged by the plaintiff that half of the motor car was on the slow lane and the other half was on the emergency lane it would have been inherently improbable for the glass splinters to have been found at 'C' but would be more probable for the glass splinters to have been found nearer to the centre of the slow lane bearing in mind that the slow lane is 3.6 metres or 11 feet and 7 inches wide as stated in the sketch plan, P1.

If the learned trial judge had correctly directed himself on the evidence adduced before him, he would also have concluded that it was most probable that the plaintiff was riding his motorcycle either on the white line demarcating the start of the emergency lane or within the emergency lane something which he should not have done since his right of way is within the slow lane and the fast lane unless, of course, he was experiencing problems with his motorcycle which fact was not in evidence before the learned trial judge.

There is another matter. This concerns the time of the first collision and whether it was already dark at that time. As mentioned earlier, the learned trial judge had made specific findings of facts concerning this, ie that the first collision occurred at night between 8pm and 8.30pm and that it was already dark when the first collision occurred. Unfortunately, he did not deem it fit to explain why he came to such a conclusion.

It would appear to this court that he had accepted in toto the evidence of the 2nd defendant and his wife to that effect without considering the following factors. First, it is clear from the evidence that neither the 2nd defendant nor his wife witnessed the first collision. They were also not present at the scene when the first collision happened. They have said that they only learnt of the accident when they happened to be passing by the place where they had earlier on left the motor car which had broken down.

There is some contradiction in the 2nd defendant's evidence. In his testimony in court, the 2nd defendant had said that the motor car broke down between 6pm and 6.30pm. However, in his police report, D10, he said the motor car broke down at 7.30pm. When cross-examined he maintained that the motor car broke down at 7.30pm. What is of crucial importance is that the learned trial judge had failed to consider that in view of the contradiction in the 2nd defendant's evidence concerning the time

the motor car broke down, he should not have accepted in toto the evidence of the 2nd defendant and his wife that the first collision happened at between 8.15pm to 8.30pm since it was only a rough estimate. The learned trial judge did not consider that the 2nd defendant had arrived at this rough estimate by estimating the length of time he took to think about what to do after the motor car broke down and also the length of time he took to speak to the tow truck operators about towing his car to the workshop. The 2nd defendant had used the same deductive process to conclude that it was dark at the time of the accident.

The learned trial judge also erred when he did not go further to consider whether it was inherently improbable for the first collision to have occurred at night between 8.15pm and 8.30pm and that it was already dark at the time of the first collision in view of the following:

First, if the accident had occurred between 8pm to 8.30pm it would not have been physically possible for SD2 to complete lodging his police report, D11, by 8.13pm bearing in mind that after the second collision, SD2 would have needed time to go to the Tapah Police Station to lodge his report. He would have also needed some time to tell the police what happened so that the latter could understand it and then take it down in a readable form. The I.O. was informed of D11 at 8.20pm. The I.O. arrived at the scene of the accident about half an hour later, ie at 8.51pm.

Secondly, if the accident had happened between 8pm to 8.30pm, the 2nd defendant would not have been able to complete lodging his police report, D10, at the Tapah Police Station by 8.41pm bearing in mind that upon reaching the scene of the accident, he would have spent some time looking at the damage to the motor car and the scene of the accident. He then had the motor car towed to the police station on the order of the PLUS personnel. Thereafter, he, himself, had gone to the Tapah Police Station to lodge his report. Similarly, like SD 2, while at the police station he would have to spend some time telling his version to the police.

It would appear from SD2's evidence that the first collision occurred at about 7.30pm during twilight time, ie the time between daylight and darkness, and that at that time he was still able to see in front of him without switching on his lights. There is only one eye witness to the first collision. He is SD 2.

The plaintiff, himself, said in his police report, P3, that the accident happened at about 8pm which would mean close to 8pm. However, this report was only lodged seven months after the accident. Hence the learned trial judge should have considered whether lesser weight should be given to this piece of evidence.

This court is satisfied that had the learned trial judge considered all the evidence and factors as set out above, he would have held that the first collision most probably occurred in the late evening at about 7.30pm instead of at night between 8pm to 8.30pm and that although it was dark at the time of the first collision there was still a faint light instead of total darkness.

In view of the foregoing, this court would answer the first issue in the negative.

Issue 2: Whether The Learned Judge Erred When He Failed To Consider The Ability Of The Plaintiff To Avoid Colliding Into The Motor Car

Even assuming that it was indeed true that the plaintiff was following closely behind the middle of a motor lorry although SD2, the motor van driver, has testified that he only saw the motor car and the motorcycle, this court is of the view that the learned trial judge erred when he failed to consider that had the plaintiff kept at a safe distance from the motor lorry and also kept a proper lookout he could have avoided colliding into the motor car since there is ample evidence to the effect that both the lights and the hazard lights of the motor car were switched on and the van driver was able to see the lights 30 meters away. Had the learned trial judge considered this factor he would have held in favour of the 2nd defendant.

This issue must, therefore, be answered in the affirmative.

Issue 3: Whether An Extremely High Standard Of Care Was Placed On The 2nd Defendant

This issue is to be answered in the negative because the learned trial judge did not accept the 2nd defendant's version that he had parked the motor car wholly within the emergency lane.

Issue 4: Whether The Learned Trial Judge Erred When He Drew An Adverse Inference Against The 2nd Defendant For Failing To Call The Tow Truck Operators

Based on the evidence appearing in the Appeal Record and the principle of law applicable this issue must be answered in the affirmative. The reason is because the learned trial judge had failed to consider that although the second defendant had testified that he could call the tow truck operators as witnesses, he had also called SD4, the adjustor, to testify that he was instructed by the 2nd defendant's solicitors to investigate and interview the tow truck operators. Despite having made efforts, he (SD4) was unable to locate the tow truck operators. SD4 had carried out a company search, D14. He had also gone to the premises of the company, Hong Hing Automobile

Service Centre Berhad, at its address at No. 27 & No. 28, Jalan Bidor Jaya 1, Bidor on one occasion, and found that although the building and the signboard were still there the company had closed down due to the economic downturn. He had made enquiries from the neighbours and managed to obtain two telephone numbers of one of the directors. He had also given details of two of the directors, ie, their names and the telephone numbers of one of them. SD4 had contacted one of the company directors, namely, Mr. Lai Kuan Loy. Upon contacting him, the latter informed SD4 to contact his brother, Mr. Lai Kuan Lim, another company director, instead. SD4 met Mr. Lai Kuan Lim who told him that the company had closed down because of the economic downturn and that the tow truck operators were no longer with the company. Some of them were working part time with other companies but he was unable to furnish to SD4 further information concerning the tow truck operators who were involved in the accident case. SD4 prepared a report of his findings, D13.

In cross-examination SD4 had agreed that the company search, D14, showed that although the name of the company had been changed the identities of the directors remained the same. SD4, however, disagreed that if he had conducted intensive investigations he would have obtained more information about the tow truck operators. He further explained that the company directors to whom he spoke to did not give him their full co-operation and neither did they give him the home addresses of the tow truck operators.

The learned trial judge erred when he did not consider the evidence of SD4 on this issue. If he had he would have been satisfied that sufficient attempts were made to locate the tow truck operators. Consequently, he would not have drawn an adverse inference against the 2nd defendant under s. 114(g) of the Evidence Act 1950 for not calling the tow truck operators.

Issue 5: Whether The Apportionment Of Equal Liability Between The Plaintiff And The 2nd Defendant Was Correct

On the issue of apportionment, the Supreme Court in the case of *Ahmad Nordin bin Haji Maslan and Anor v. Eng Ngak Hua and Ors* [1985] 2 MLJ 431, at p. 434, held as follows:

> The next point relates to the apportionment of liability. As stated earlier, the Judge held that both were equally to blame for the accident and apportioned it to 50-50. It is not appropriate in our view to use reported cases as guidelines since there is no fixed formula on which apportionment can be worked on. All depends on the discretion of the trial judge and has to be considered in the light of the facts and circumstances of a particular case. It is therefore a question of fact.

Mr. Gurmit Singh, the learned counsel for the 2nd defendant, has submitted that the 2nd defendant should not be held liable at all because he had parked the motor car wholly within the emergency lane and had switched on both the lights and the hazard lights. In support thereof, he relied on the decision of the majority in the Federal Court case of *Chan Loo Khee v. Lai Siew San and Ors* [1971] 1 MLJ 253 where Gill FJ had held that he had not been able to find a single decided case where the owner or driver of a vehicle leaving it on a highway with its lights on has been held liable in negligence.

In response, Mr. Sarjeet Singh, the learned counsel for the plaintiff, relied on the Privy Council case of *Chop Seng Heng v. Thevannasan and Ors* [1975] 2 MLJ 3 where all the five Law Lords had respectfully and emphatically approved the following statement of general principle enunciated by Ong CJ in his dissenting judgment in that case at pp. 254 and 255:

> If parking a car, however recklessly, so as to cause needless obstruction to other road users, were to be held blameless, merely because other motorists could still have room to pass, provided they kept a proper look-out, then it would appear that the deliberate parking of a car anywhere, even in the middle of the highway, should be considered equally excusable, if not justifiable, regardless of the fact that, by reason of such obstruction, other motorists had come to grief by reason of their not being fully alert. In such cases there should, in my opinion, be proper apportionment of blame depending on the circumstances. But, to exonerate the obstructionist completely – when it is undeniable that, but for the presence of the obstruction there could not possibly have been an accident – is to ignore the principle of placing the blame fairly on those to be blamed for their acts or omissions. In this age of fast motor transport I think it is the duty of the courts to eschew excessive legalism and to require that every motorist should observe the golden rule of showing due consideration for other road-users, or suffer the consequences of his failure to do so.

In the final analysis, there being no misdirection nor error in principle by the trial judge, Lord Edmund Davies who delivered the judgment of the board restored the 75%:25% apportionment arrived at by the trial judge, Suffian FJ in the high court. It is noteworthy that Ong CJ in his dissenting judgment in the *Chan Loo Khee* case *supra* had gone on to hold the drivers of the Opel and Fiat 80% and 20% responsible for the unfortunate accident.

In the appeal before this court the 2nd defendant himself testified that after the accident the motor car was towed to the police station upon the order of the PLUS personnel before the police arrived at the scene. As a result of this no record of the motor car was made by the I. O. in his sketch

plan, P1. The question that arises is why would the PLUS personnel order the motor car to be towed to the police station if it was not causing obstruction to other road users, in particular, motorcyclists as it is a common experience that motorcyclists do use the emergency lane or ride along the white line demarcating where the slow lane ends and where the emergency lane begins in order to keep out of the way of bigger vehicles using the slow lane such as cars, buses and lorries travelling at a fast speed. In fact when the plaintiff was cross-examined by the 2nd defendant's counsel in the court below it was put to him that he was riding along the emergency lane or along the white line.

On the question of law, I am of the view that the following dicta of Lord Uthwatt in *London Passenger Transport Board v. Upson* [1949] AC 155, at p. 173, is applicable here as the surrounding circumstances of this appeal plainly justify their application:

> A driver is not, of course, bound to anticipate folly in all its forms, but he is not, in my opinion, entitled to put out of consideration the teachings of experience as to the form those follies commonly take.

Since it was reasonably foreseeable that motorcyclists may use the emergency lane or ride on the white line the 2nd defendant should have parked the motor car further inside the emergency lane as the whole width of the emergency lane was 3.2 metres or 10 feet 4 inches including the grass verge whereas the standard width of a car is only about 6 feet or have a warning sign placed behind the motor car to alert the motor cyclists.

With respect to Mr. Gurmit Singh, the learned counsel for the 2nd respondent, I did not find the cases of *Abdul Mokhti bin Haji Ahmad v. Idris bin Ibrahim* [1977] 2 MLJ 85, *De Cotta v. Tan Hock Lee* [1972] 2 MLJ 173 and *Parkinson v. Liverpool Corpn.* [1950] 1 All ER 367 relevant nor applicable because they concern the duty of a driver following a leading car which was to drive in such a fashion so as to avoid accidents arising out of exigencies of the leading car since the facts of the present appeal show that when the plaintiff collided into the rear right of the motor car, the motor car was not moving and was merely left stationary on the emergency lane of the highway.

Similarly, the case of *Siow Choo Foo v. Lee Peng Lay and Anor* [1981] 2 MLJ 336 where the 1st defendant was held two thirds to blame for leaving his stationary lorry on the road on a dark night with its tail lights off and the plaintiff one third to blame for not slowing down on being blinded by the glare of the head lights of an oncoming vehicle is to be distinguished from the instant appeal before this court because unlike the facts here, the lorry in that case was not left on the emergency lane of a highway.

On the principle of law applicable, Suffian LP in *Samar bt Mansor v. Mustafa Kamarul Ariffin* [1974] 2 MLJ 71 had this to say:

> The learned trial judge was concerned to determine who was telling the truth, but we sitting in an Appellate Court are concerned to determine not so much the truth as whether there had been an error on the part of the trial judge. The issue is a simple one – was the learned trial judge in error in concluding the defendant was not negligent?

The learned trial judge held that the plaintiff's version was more probable. Yet, he apportioned liability at 50/50 on the ground that the 2nd defendant had not parked his car wholly within the emergency land and that the 2nd defendant had not placed a warning sign behind his car to warn other vehicles of the presence of the motor car on that part of the road.

The case of *Zainap bte Abd Majid & Ors v. Gan Eng Hwa & Ors* [1995] 1 MLJ 801 where Richard Talalla J had apportioned liability between the driver and owner of a lorry and the driver of a motor car at 50/50 is distinguishable on facts. In that case the lorry was parked on the Muar-Batu Pahat main road facing the wrong way thereby causing obstruction and danger to other road users such that the driver of the motor car, in which the plaintiffs were passengers, driven by one Encik Taib in attempting to avoid colliding into a Mercedes in front of him collided with an on coming express bus.

The learned judge had held that the lorry was parked on the road needlessly and selfishly and in such a way as to cause obstruction and danger to other road users. In the instant appeal there is evidence that the motor car which was driven by the 2nd defendant developed engine trouble causing the motor car to break down and there was spillage of oil on the road. Hence the act of the 2nd defendant in parking the motor car in the emergency lane was justified and clearly not needless nor selfish. However in parking the motor car in the emergency lane he omitted to ensure that the motor car was parked sufficiently inside the emergency lane so as not to cause obstruction to motor cyclists who may use the emergency lane. Having parked the motor car close to the white line demarcating the beginning of the emergency lane he should have placed a warning sign behind the motor car. In failing to do this he had contributed to the accident by not exercising the proper standard of care required of a prudent motorist in the prevailing circumstances.

In the ultimate analysis, upon a full evaluation of the evidence as disclosed in the Appeal Record and the grounds of judgment of the learned trial judge, I am satisfied that the learned trial judge had erred when he did not draw the proper inferences from the proven facts. I am also satisfied that if the learned trial judge had not fallen into that error he would have held that the evidence of the plaintiff with regard to the accident was inherently improbable. (See *Mohd Salleh Samad v. Zainodin Dongking* [2002] 1 CLJ 139, *China Airlines Ltd. v. Maltran Air Corp Sdn Bhd (formerly known as Maltran Air Services Corp Sdn Bhd) and Another Appeal* [1996] 3 CLJ 163.)

The learned trial judge would also have found the 2nd defendant's version that he had parked the motor car on the emergency lane as a result of engine trouble as evidenced by the spot of oil on the road, the tyre marks and the oil stains on the tyre of the motor car, inherently probable. Having done so, the learned trial judge would then have gone on to consider whether the 2nd defendant had contributed to the accident by parking his car too close to the white line demarcating the start of the emergency lane and the end of the slow lane without placing a warning sign at a reasonable distance behind the motor car. If he had done this, he would have concluded that the 2nd defendant should either have parked the motor car further inside the emergency lane since there was the undisputed evidence of a grass verge which was 0.6 metres wide within the emergency lane or place a warning sign behind the car. For this act of contributory negligence the learned trial judge would have held that the 2nd defendant is 25% liable to the plaintiff for the injuries, disabilities, pain and suffering and loss suffered by the plaintiff as a result of the accident.

Therefore, the last and final issue must be answered in the negative.

In the premises the court allowed the 2nd defendant's appeal on the issue of liability. The order of the learned trial judge on apportionment of equal liability between the plaintiff and the 2nd defendant is unjustified and is set aside. Liability is apportioned between the plaintiff and the 2nd defendant at 75% / 25%. The 2nd defendant having withdrawn his appeal against the decision of the learned trial judge on the issue of quantum, this court strikes out the appeal of the 2nd defendant on the issue of quantum and awards half costs of the appeal to the second defendant.